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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

15 Jessica Miracle; et al.,

### **Plaintiffs.**

V.

Katie Hobbs, in her official capacity as  
Arizona Secretary of State.

Defendant.

No. 2:19-cv-04694-SRB

# **MOTION FOR RECONSIDERATION**

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## I. INTRODUCTION

Plaintiffs respectfully move for reconsideration of the portion of the Court’s December 16, 2019 Order (Doc. 36) (“Order”) that granted Arizona Secretary of State Katie Hobbs’s (the “Secretary”) Motion to Dismiss (Doc. 16) (“MTD”) in part—specifically its dismissal of Plaintiffs’ First Amendment claims on two separate theories and their Equal Protection Claims in their entirety. The decision to dismiss these claims was based on manifest error and requires reconsideration for several important reasons. *First*, the Order erroneously dismissed Plaintiffs’ claim that the Strikeout Law restricts the pool of potential circulators based on its conclusion that the “the Strikeout Law is distinct from” laws that impose restrictions on petition circulators that courts have found violate the First Amendment, “because the laws at issue in those cases implicated the communicative message associated with the physical act of circulation *at the time of circulation.*” Order at 6. In doing so, it adopted a litmus test that no court has recognized and that cannot be squared with binding precedent. *Second*, it erroneously dismissed Plaintiffs’ First Amendment claim based on the Strikeout Law’s significant burdens on the ability of initiative proponents to gather the signatures necessary for ballot access. In this case, perhaps as a consequence of the fact that the Court was simultaneously ruling on the Secretary’s MTD and the Plaintiffs’ motion for a preliminary injunction (“PI Motion”), the Order appears to commingle the standards applicable to those different motions. Thus, rather than accepting as true the facts pled in the Complaint, the Order appears to conclude that this claim cannot survive because of what it viewed as a failure of proof. But Plaintiffs have no burden to come forth with any evidence to avoid dismissal at the MTD stage. Moreover, the Order’s discussion of this claim failed to consider or address a number of significant—and more than *sufficient*—factual allegations in the Complaint that support this claim. *Next*, by prematurely dismissing Plaintiffs’ *Anderson-Burdick* claim with prejudice and without conducting its own fact-intensive inquiry, the Order commits the same legal errors that the Ninth Circuit held reversible in *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018). *Lastly*, the Order’s conclusion that Plaintiffs’ alternative Equal Protection Claim

1 must be dismissed as duplicative of their First Amendment content-based claim (which the  
 2 Court did not dismiss), was contrary to binding Ninth Circuit precedent.

## 3                   II.     LEGAL STANDARD

4       A “district court may reconsider and revise a previous interlocutory decision for any  
 5 reason it deems sufficient, even in the absence of new evidence or an intervening change in  
 6 or clarification of controlling law.” *Hydranautics v. FilmTec Corp.*, 306 F. Supp. 2d 958,  
 7 968 (S.D. Cal. 2003); *see also Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996)  
 8 (“[I]nterlocutory orders . . . are subject to modification by the district judge at any time prior  
 9 to final judgment.”). Here, manifest error requires reconsideration of the Court’s Order.

## 10                  III.    ARGUMENT

### 11                  A.     **There is no temporal litmus test that separates restrictions on petition 12                   circulators that violate the First Amendment from ones that do not.**

13       Plaintiffs assert that the Strikeout Law violates the First Amendment because it  
 14 effectively restricts the pool of available circulators, complicates the signature-gathering  
 15 process, increases expenses, and ultimately makes it more difficult to successfully achieve  
 16 ballot access. Each of these assertions are supported by multiple factual allegations in the  
 17 Complaint and the Supreme Court and the Ninth Circuit (among many others) have  
 18 repeatedly recognized that these types of injuries give rise to cognizable (and meritorious)  
 19 First Amendment claims. *See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S.  
 20 182, 184 (1999); *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988); *Nader v. Brewer*, 531 F.3d  
 21 1028, 1036 (9th Cir. 2008); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 388 (6th Cir.  
 22 2008); *Chandler v. City of Arvada*, 292 F.3d 1236, 1243 (10th Cir. 2002). The Order  
 23 correctly recognizes that laws that narrow the potential pool of circulators may violate the  
 24 First Amendment, but then finds Plaintiffs failed to state a claim upon which relief may be  
 25 granted because “[t]he Strikeout Law . . . does not implicate the physical act of circulation  
 26 *at the time of circulation* because it . . . comes into play only *after* all initiative-related  
 27 speech has occurred.” Order at 6. This was manifest error, and it should be corrected.

28       As the Supreme Court wrote in *Buckley*: “We have several times said ‘no litmus-

1 paper test’ will separate valid ballot-access provisions from invalid interactive speech  
 2 restrictions; we have come upon ‘no substitute for the hard judgments that must be made.’”  
 3 525 U.S. at 192 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see also Timmons v.*  
 4 *Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (“No bright line separates  
 5 permissible election-related regulation from unconstitutional infringements on First  
 6 Amendment freedoms.”). The First Amendment *demands* that courts “be vigilant in making  
 7 those judgments, to guard against undue hindrances to political conversation and the  
 8 exchange of ideas.” *Buckley*, 525 U.S. at 192. Nevertheless, the Order imposes a temporal  
 9 litmus test—one that no court has ever endorsed, and which itself runs contrary to  
 10 authoritative precedent in ballot initiative cases raising First Amendment claims.

11 That there is no such distinction is most evident from the Supreme Court’s seminal  
 12 decision in *Buckley*, in which it affirmed the invalidation of a Colorado law that infringed  
 13 on initiative-related speech even *after* signature gathering was complete. That law required  
 14 that paid circulators’ names and wages be publicly disclosed in not only ongoing monthly  
 15 reports, but also a final report to be issued *after* signature-gathering concluded. *Id.* at 201.  
 16 If there was a temporal line to be drawn, this was the place to do it. Nonetheless, the Court  
 17 held that these requirements not only implicated, but *violated* the First Amendment. *See id.*  
 18 at 201–05. As a drafting matter, it would not have been difficult for the Supreme Court to  
 19 write an opinion finding the monthly reports problematic, but concluding that the final  
 20 report—issued after signature gathering was completed—was not. But it invalidated both.

21 It did so despite the fact that, as with the Strikeout Law, any impact on the circulator  
 22 would not come until after the signature gathering was completed—and, if anything, the  
 23 impact of the regulation on circulators was far less severe, requiring only the disclosure of  
 24 the circulators’ name and pay, not their meaningless physical appearance at the whim of a  
 25 challenger, or the undoing of all of their efforts to support the measure. *See id.*; *see also Am.*  
 26 *Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1105 (10th Cir. 1997)  
 27 (“[C]ompelling the disclosure of the identities of every paid circulator chills paid circulation,  
 28 a constitutionally protected exercise.”), *aff’d* 525 U.S. 182 (1999). Moreover, in finding the

1 after-the-fact measure invalid, the Supreme Court emphasized that the disclosure  
 2 requirement was imposed on only paid circulators, and not their volunteer counterparts.  
 3 *Buckley*, 525 U.S. at 205. This, too, is a feature it shares with the Strikeout Law. Thus, based  
 4 on *Buckley* alone, the dismissal of Plaintiffs' claim based on a newly created temporal  
 5 litmus test should be reversed.

6         The same conclusion follows from *Meyer v. Grant*, 486 U.S. 414 (1988), in which  
 7 the Supreme Court struck down a Colorado law that made it a felony to pay petition  
 8 circulators. The Court explained that the law both "limits the number of voices who will  
 9 convey [the sponsors'] message" and "makes it less likely that [the sponsors] will garner  
 10 the number of signatures necessary to place the matter on the ballot." *Id.* at 422–23. Of  
 11 course, Colorado could charge someone with a felony only *after* the circulator had already  
 12 (1) circulated an initiative petition, and (2) received money in exchange. Thus, the  
 13 unconstitutional limitation on circulators that "restrict[ed] political expression," by  
 14 definition took place only *after* signature gathering occurred, and well after proponents  
 15 would have made their decisions about whether to pursue a petition without paid circulators,  
 16 and after circulators made their own decisions about their willingness to gather signatures  
 17 without pay, or risk enforcement of the law. *See id.* at 422. Yet, the Supreme Court had little  
 18 trouble concluding that the law both implicated and violated the First Amendment.

19         In both cases, the Supreme Court emphasized that the laws in question violated the  
 20 First Amendment because their effects served to limit the pool of potential circulators. The  
 21 Court has never made any distinction between restrictions that are triggered before, after,  
 22 or during the signature gathering process. To the contrary, as these cases demonstrate, the  
 23 Court has found that even laws that are not implicated until after signature gathering occurs  
 24 may be unconstitutional restrictions on political speech. This is consistent with the Court's  
 25 repeated admonition that there is no "litmus-paper test" that "separate[s] valid ballot-access  
 26 provisions from invalid interactive speech restrictions." *Buckley*, 525 U.S. at 192. In every  
 27 case, courts must make the hard judgments about whether the restrictions at issue  
 28 significantly inhibit communication with voters about proposed political change, and

1 whether any such inhibition is warranted by the state interests alleged to justify those  
 2 restrictions. *Id.* This is a highly individualized factual inquiry. *See generally id.; see also*  
 3 *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 419–420 (6th Cir. 2014); *Angle v.*  
 4 *Miller*, 673 F.3d 1122, 1132–34 (9th Cir. 2012); *Nader*, 531 F.3d at 1034–35; *Citizens for*  
 5 *Tax Reform v. Deters*, 518 F.3d 375, 383 (6th Cir. 2008); *Ariz. Right to Life Political Action*  
 6 *Comm. v. Bayless*, 320 F.3d 1002, 1007–14 (9th Cir. 2003).<sup>1</sup>

7 Furthermore, neither the Supreme Court nor the Ninth Circuit have narrowly defined  
 8 First-Amendment-protected circulation activity as only the actual physical interaction  
 9 between circulator and signer. They have consistently recognized that the question is not  
 10 *when* in the process a restriction is imposed, but rather *whether* it imposes “*undue*  
 11 *hindrances* to political conversations and the exchange of ideas.” *Buckley*, 525 U.S. at 192  
 12 (emphasis added). Courts must be “vigilant” in their examination of a challenged restriction,  
 13 to ensure that is not the case. *Id.* A temporal distinction that permits a state to impose  
 14 burdens on circulators with impunity, provided they are not effectively triggered until the  
 15 circulator has completed signature gathering, would open the floodgates to clever  
 16 restrictions that walk this line, with no mind to their actual impact on the pool of  
 17 circulators—whether because circulators who have been exposed to the law’s burdens  
 18 become increasingly unwilling to participate, *see, e.g.*, Compl. ¶¶ 84–85, or because  
 19 proponents, in order to have a realistic chance of success, must substantially narrow the  
 20 pool of individuals who they will use to circulate petitions, *see, e.g.*, Compl. ¶¶ 26–27.

21 Elsewhere in its Order, the Court seemed to indicate that it did not view choices by  
 22 proponents or circulators sparked by the Strikeout Law to narrow the pool from which they  
 23 hired, or to decline, or be reluctant to circulate, as cognizable First Amendment harms.

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24       <sup>1</sup> Moreover, courts look to the state’s legal regime as a whole to determine whether  
 25 any such restriction may be warranted. *See, e.g.*, *Buckley*, 525 U.S. at 192; *see also Nader*,  
 26 531 F.3d at 1037–38 (finding state’s interest in subpoena compliance could be more  
 27 narrowly met by having circulators agree to be bound by state’s subpoena authority). Yet  
 28 the Court’s Order also did not consider Plaintiffs’ allegations that such registration is  
 already required for paid and non-resident circulators in Arizona. Compl. at ¶¶ 43–45.

1 Order at 6 n.8 (disregarding Plaintiff Miracle’s decision to decline a circulation job for a  
 2 nomination petition because of her misapprehension about the reach of the Strikeout Law)<sup>2</sup>;  
 3 *id.* at 15-16 (stating allegation that Plaintiffs NextGen and Arizonans for Fair Lending’s  
 4 choice between “whether to refrain from core political activity altogether or amass and  
 5 divert significant resources” did “not constitute evidence of harm”). To the extent this  
 6 application of the law colored the Court’s view of Plaintiffs’ claim that the Strikeout Law  
 7 violated the First Amendment by narrowing the pool of circulators, it was manifest error.

8 It is well established that chilled speech and self-censorship establish cognizable  
 9 harm. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988); *Va. v.*  
 10 *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *San Diego Cty. Gun Rights Comm.*  
 11 *v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996). The same is true of laws that make people  
 12 more reluctant to engage in protected First Amendment activity, even if it is not prohibited  
 13 outright (or there are *no* circumstances under which they would engage in such activity).  
 14 *See, e.g., Meyer*, 486 U.S. at 422-23 (striking down law banning paid circulators because it  
 15 reduced overall pool of circulators, even though a circulators could still choose to work for  
 16 free); *Buckley*, 525 U.S. at 192, 198 (striking down law requiring circulators to wear ID  
 17 badges and have name and pay disclosed, even though they could still choose to work if  
 18 they wore ID or did not object to their name and pay being disclosed, and relying on  
 19 sponsor’s assertion that restrictions limited number of people who would circulate); *Ariz.*  
 20 *Right to Life Political Action Comm.*, 320 F.3d at 1006 (holding organization suffered First  
 21

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22       <sup>2</sup> Plaintiff Miracle’s decision to decline another petition-circulating job chilled even  
 23 her protected First Amendment-protected activity because the signatures she would have  
 24 collected for that candidate could not have been invalidated through the Strikeout Law’s  
 25 operation (which applies to only initiatives). The Order was incorrect to dismiss this fact as  
 26 irrelevant to its First Amendment inquiry. As the Ninth Circuit recognized in *Sanders*  
 27 *County Republican Central Committee v. Bullock*, the fact that a law may cause people to  
 28 decline to engage in communications that are not actually within the law’s reach is itself  
 proof that the law “has thus had a ‘chilling effect’ radiating from the disfavored speaker to  
 untargeted individuals and plainly protected speech.” 698 F.3d 741, 748 (9th Cir. 2012);  
*see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1196–98 (9th Cir. 2018);  
*Wolfson v. Brammer*, 616 F.3d 1045, 1058-59 (9th Cir. 2010).

1 Amendment injury when it “was forced to modify its speech and behavior to comply with  
 2 the statute” at issue); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174 (9th Cir. 2018)  
 3 (holding businesses experienced “actual injury” when they “modified their speech and  
 4 behavior based on” anticipation of law’s enforcement).

5 In each instance, courts recognized that the First Amendment is violated when the  
 6 reality of a restriction is it imposes unjustifiable “choices” upon speakers in the exercise of  
 7 their core political speech rights. And those choices need not be harrowing. To take just a  
 8 few examples from *Buckley*, the requirement that a circulator wear ID, *see* 525 U.S. at 198–  
 9 200, or acquiesce to the publication of his name and pay after signature gathering is over,  
 10 *id.* at 201–204, is far less burdensome than the Strikeout Law’s requirement that he be able  
 11 to travel hundreds or thousands of miles to physically appear (with no requirement that any  
 12 testimony be actually sought from him) at the whims of a challenger at some unknown date  
 13 in the future, or else have all of the signatures that he gathered “deemed invalid.” A.R.S §  
 14 19-118(E); *see also, e.g.*, Compl. ¶¶ 20–21, 84.

15 Against this backdrop, the Complaint’s extensive factual allegations as to why and  
 16 how the circulator pool is reduced by the Strikeout Law more than adequately allege a First  
 17 Amendment claim. *See, e.g.*, Compl. at ¶¶ 20-21, ¶¶ 84-85 (asserting “many circulators are  
 18 . . . unwilling or unable to” circulate because of Strikeout Law); ¶ 86 (alleging proponents  
 19 are reluctant to hire circulators from outside Phoenix, even though geographic distribution  
 20 is important to a successful campaign, because of Strikeout Law); ¶¶ 26-27 (alleging  
 21 Plaintiffs had and anticipate continued difficulty securing circulators and signatures).

22 **B. Plaintiffs alleged sufficient facts to support a claim that the Strikeout  
 23 Law imposes a substantial burden to ballot access.**

24 The Court’s decision to dismiss Plaintiffs’ First Amendment claim to the extent it  
 25 relies on the theory that the Strikeout Law imposes a substantial burden to ballot access was  
 26 also manifest error and should be reconsidered for several reasons. Here, the Court begins  
 27 its discussion by agreeing with Plaintiffs that “ballot-access measures like the Strikeout Law  
 28 can restrict political speech” by making it more difficult to access the ballot. Order at 7.

Indeed, the case law demands such a conclusion. *See, e.g., Angle*, 673 F.3d at 1133 (noting Ninth Circuit “assume[s] that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot”); *see also Meyer*, 486 U.S. at 423 (1988) (finding statute that made it less likely that initiative would appear on the ballot violated First Amendment); *cf. ACLU v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006) (finding failure of an initiative to qualify for ballot constituted “real or immediate threat of an irreparable injury”). The Court also agreed that none of the cases that the Secretary relied upon to argue that the threat of signature disqualification cannot violate the First Amendment were “particularly apt.” Order at 7. Nevertheless, the Order concludes: “at this juncture, Plaintiffs have simply failed to show facts or circumstances demonstrating such a restrictive effect.” *Id.* On that basis, it dismissed Plaintiffs’ claim.

As a threshold matter, in reaching this conclusion, the Order appears to impermissibly weigh the evidence submitted in support of the PI Motion to determine whether Plaintiffs adequately stated a claim on this theory in their Complaint. Such an approach is not appropriate on a Rule 12(b)(6) motion, where courts must accept the facts pleaded in the Complaint as true and may not rely upon allegations or facts outside the complaint or weigh the evidence. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007); *United States v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011) (quoting *Schneider v. Cal. Dep’t of Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)); *see also In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016). The Order begins by acknowledging this, *see* Order at 2-3, but then appears to veer from this standard, performing an analysis more suited to evaluating the case on the merits.<sup>3</sup>

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<sup>3</sup> This is not an isolated incident. The portion of the Order that pertains to the MTD references the Complaint’s allegations only three times. Otherwise it conducts its analysis by almost exclusive reference to the PI Motion, and the evidence marshalled in support. And the Order does not just reference the evidence submitted in support of the PI Motion (itself inappropriate), it appears to weigh it and, finding it wanting, improperly grant the MTD. *See, e.g.*, Order at 6 (finding “insufficient evidence of a ‘chilling’ effect” to dismiss

1        This is particularly apparent in the discussion of Plaintiffs' claim that the Strikeout  
 2 Law violates the First Amendment because it significantly burdens signature gathering  
 3 efforts. *See id.* at 7-8. Indeed, the Order's conclusion that "Plaintiffs have simply failed to  
 4 show facts or circumstances demonstrating such a restrictive effect" cites the PI Reply  
 5 Brief, not the Complaint at all. *Id.* at 7. And its entire discussion of its reasoning for  
 6 dismissing the claim refers only once to the Complaint, and then to no more than a single  
 7 paragraph. In doing so, it ignores multiple other factual allegations pled by Plaintiffs in  
 8 support of their claim that the Strikeout Law makes it substantially more difficult to gather  
 9 the number of signatures required to obtain ballot access.

10       To wit, the Order considers *only* certain facts about Plaintiff Rose Smallcanyon's  
 11 experience. It then rejects them as insufficient, concluding "[i]t requires several leaps of  
 12 faith to say that if" a circulator who gathered as few signatures as the 43 that Smallcanyon  
 13 gathered "was unable to comply with a subpoena, the invalidation of that relatively small  
 14 number of signatures would precipitate a measure's failure to make the ballot, which would  
 15 then chill statewide conversation concerning that measure." Order at 8. But the Complaint  
 16 also contains allegations about Plaintiff Jessica Miracle, whose 2,604 signatures were  
 17 invalidated by the Strikeout Law when she was unable to appear in person to respond to a  
 18 subpoena because her children were sick. Compl. ¶ 20. The Court does not appear to have  
 19 considered those allegations in concluding that Plaintiffs could not proceed with this claim.

20       The Order also does not discuss the Complaint's allegations about Plaintiff  
 21 NextGen's experience, where 1,180 circulators were subpoenaed and the initiative only  
 22 survived because of NextGen's extraordinary efforts in ensuring the presence of 913 of  
 23 them. *Id.* ¶¶ 26; 59-68. Among other things, the Order does not appear to have considered

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24       claim) (emphasis added). Because the Secretary largely addressed the PI Motion's  
 25 arguments in her MTD instead of her response to the PI Motion, there was substantial  
 26 overlap in the legal arguments across the motions. *See* Def.'s Opp. to PI Mot. at 2  
 27 (incorporating by reference the Secretary's MTD), Doc. 17; Pls.' Reply in Supp. of PI Mot.  
 28 at 1 (noting the Secretary confines her merits arguments to the MTD), Doc. 23. But in doing  
 so, the Secretary could not alter the standard by which the Court was required to evaluate  
 the MTD.

1 the assertion that, in that instance, “[a]pproximately 300 circulators had their signatures  
 2 stricken when they did not appear on the first day of trial” and “[a] further forty-six  
 3 circulators who initially appeared at trial had their signatures stricken after they failed to  
 4 return during a subsequent check-in.” *Id.* ¶ 66. It does not require any leaps to conclude  
 5 that, under such circumstances, the Strikeout Law could very well sound an initiative’s  
 6 death knell and keep it from obtaining ballot access.

7       The Order also does not discuss the allegations related to the experience of the  
 8 Outlaw Dirty Money initiative in 2018, which *was* stricken from the ballot when a paltry  
 9 15 circulators who were subpoenaed failed to appear because of service issues and the  
 10 Strikeout Law deemed all 8,824 signatures they gathered invalid. *Id.* ¶¶ 69-70, 74. Nor does  
 11 the Order discuss the experience of Arizonans for Fair Wage and Healthy Families, another  
 12 measure that was knocked below the signature threshold because of the Strikeout Law. *Id.*  
 13 ¶¶ 75-78.

14       The Order also failed to consider the other ways in which the Complaint alleges that  
 15 the Strikeout Law makes it substantially more difficult for initiative proponents to qualify  
 16 for the ballot. Plaintiffs allege that the Law caused the proponents of the Arizonans for Fair  
 17 Wage and Healthy Families initiative to suspend campaign operations for a month, divert  
 18 resources, reduce fundraising activities, and turn away volunteers, all making it more  
 19 difficult to qualify initiatives for the ballot. *See, e.g.,* Compl. ¶ 75. NextGen and Arizonans  
 20 for Fair Lending make similar allegations. *See, e.g., id.* ¶ 26 (noting NextGen “anticipates  
 21 that it will face a restricted pool of circulators because it must ensure that circulators are  
 22 willing and able to comply with a subpoena”); *id.* ¶ 27 (alleging Arizonans for Fair Lending  
 23 will be required to budget and divert additional resources to adequately defend against  
 24 Strikeout Law in 2020); *id.* ¶ 87 (asserting Strikeout Law “significantly reduces the chances  
 25 that an initiative can obtain the number of signatures necessary to achieve ballot access”);  
 26 *id.* ¶ 88 (asserting Plaintiffs must “gather additional signatures, well in excess of the  
 27 minimum constitutional threshold, to ensure that any signatures lost as a result of the  
 28 Strikeout Law are not outcome-determinative”; if not for Strikeout Law, “initiative efforts

1 could gather far fewer signatures and still well exceed the constitutional minimum”).

2 It was improper for the Court to disregard this significant quantum of factual  
 3 allegations, to assume at the motion to dismiss stage that “the plaintiff[s] will fail to find  
 4 evidentiary support for [their] allegations,” or to conclude that the evidence cited in  
 5 Plaintiffs’ PI Motion comprised the universe of all available evidence to prove Plaintiffs’  
 6 claims, and finding it unpersuasive, to dismiss the claim outright. Having stated a claim for  
 7 relief, Plaintiffs are entitled to present evidence to support their claims before a factfinder  
 8 at the appropriate stage of litigation, notwithstanding the Court’s views on the strength of  
 9 the declarations submitted thus far in this preliminary stage of the case. Plaintiffs’  
 10 allegations are more than sufficient to state a claim under each of the First Amendment  
 11 theories asserted in the Complaint.

12 **C. The Court’s dismissal of Plaintiffs’ Equal Protection claim (Count III),  
 13 which is evaluated under *Anderson-Burdick*, cannot be squared with  
 binding precedent in *Soltysik v. Padilla*.**

14 By prematurely dismissing Plaintiffs’ Equal Protection claim alleged in Count III of  
 15 the Complaint, which is analyzed under the *Anderson-Burdick* balancing test, the Order  
 16 committed similar errors of law that the Ninth Circuit found reversible in *Soltysik*, 910 F.3d  
 17 at 444. Specifically, the Court failed to conduct the “context-specific analysis” that the test  
 18 requires, instead outsourcing its analysis to an inapposite decision by the Arizona Supreme  
 19 Court. *Id.* Further, the Order resolved factual issues crucial to the proper application of the  
 20 *Anderson-Burdick* test, again by looking to the decision of the Arizona Supreme Court, and  
 21 without the benefit of a fully developed evidentiary record *in this case*—the precise error  
 22 that the *Soltysik* court rejected.

23 In *Soltysik*, the plaintiffs alleged that a California ballot access law violated the First  
 24 and Fourteenth Amendments by requiring certain minor-party candidates to list their party  
 25 preference on the ballot as “none.” *Id.* The district court properly articulated the *Anderson-*  
*Burdick* test as requiring it to weigh the burden on plaintiffs’ articulated First Amendment  
 26 rights against “‘the precise interests put forward by the State as justifications for the burden  
 27 imposed by its rule,’ taking into consideration ‘the extent to which those interests make it

1 necessary to burden the plaintiff’s rights.”” *Burdick v. Takushi*, 504 U.S. 428, 445–46 (1992)  
 2 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). It then reviewed the  
 3 allegations in the complaint and dismissed the claim with prejudice, concluding—as a  
 4 matter of law—that the burdens were not severe and that California’s purported interests  
 5 justified the law.

6       The Ninth Circuit reversed. In doing so, it emphasized that ultimate application of  
 7 *Anderson-Burdick* “rests on the specific facts of a particular election system, not on strained  
 8 analogies to past cases, as analogy and rhetoric are no substitute for evidence.” *Id.* at 444  
 9 (citing *Ariz. Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016)). Accordingly, the  
 10 Ninth Circuit found that the district court’s conclusion that the alleged burdens were not  
 11 “severe” and thus California’s interests outweighed them were “premature” until “both  
 12 sides ha[d] developed their evidence.” *Soltysik*, 910 F.3d at 450. Without “evidence  
 13 showing the true extent of the burden” or “the weightiness of California’s interests in  
 14 imposing that burden,” the court found itself “in the position of Lady Justice: blindfolded  
 15 and stuck holding empty scales.” *Id.* at 444 (citing *Ariz. Libertarian Party v. Reagan*, 798  
 16 F.3d 723, 736 (9th Cir. 2015)). Here, the dismissal of Plaintiffs’ *Anderson-Burdick* claim  
 17 echoes the errors detailed in *Soltysik*: like the district court there, the Court skipped its own  
 18 context-specific inquiry and prematurely weighed facts without an evidentiary record.

19       In fact, the Order’s analysis of Plaintiffs’ Equal Protection claim is even more  
 20 problematic than the district court’s approach in *Soltysik*. Although the district court in  
 21 *Soltysik* attempted to conduct the balancing test using allegations in the plaintiffs’  
 22 complaint, here the Order disregards the Complaint altogether and instead focuses on the  
 23 Arizona Supreme Court’s analysis in *Stanwitz v. Reagan*, 245 Ariz. 344, 348, 429 P.3d  
 24 1138, 1142 (2018), as amended (Nov. 27, 2018). Specifically, the Order holds that because  
 25 the *Stanwitz* court “has already held that the Strikeout Law does not hinder or restrict the  
 26 initiative process” under Article IV of the Arizona State Constitution, “the Strikeout Law  
 27 does not severely burden Plaintiffs’ fundamental right to vote.” Order at 12.

28       This is a problematic conclusion for several reasons. First, as the Order notes,

1     Stanwitz considered the question of whether the Strikeout Law violated “Article IV of the  
 2     Arizona State Constitution. *Id.* It did not consider whether it might violate the federal Equal  
 3     Protection Clause. These are not the same analyses: the federal question requires the Court  
 4     to balance the burdens that the Law imposes on the Plaintiffs based on a hard look at the  
 5     record before it against the specific justifications the state sets forth for the restriction.  
 6     *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Soltysik*, 910 F.3d at 446.  
 7     The Ninth Circuit has been clear that at no point does this become a rational basis analysis:  
 8     even when the burden imposed by the law is minuscule, the Court must always consider  
 9     whether the justification offered by the state operates for the purpose asserted (the so-called  
 10     “means-fit”) analysis. *Soltysik*, 910 F.3d at 446–47; *Arizona Green Party*, 838 F.3d 983;  
 11     *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc). In  
 12     contrast, the state court considered, under its own line of state constitutional precedent,  
 13     whether the Law “unreasonably hinder[s] or restrict[s],” the initiative process, and whether  
 14     it “reasonably supplements the constitutional purpose” by fostering the integrity of the  
 15     process. *Stanwitz*, 245 Ariz. at 346. In other words, the state court was not required to (and  
 16     did not) conduct the same balancing test that the federal court must, nor was it required to  
 17     (and it did not) satisfy a means-fit requirement.

18       The state court was also contending with an entirely different record and a different  
 19     assertion of rights. For instance, the affected right at issue in *Stanwitz* was initiative  
 20     proponents’ state constitutional right to participate in the initiative process. Here, it is the  
 21     right to vote of individual voters, whose otherwise valid signatures are being rejected under  
 22     the Strikeout Law. Compl. ¶¶ 112–19. In *Stanwitz*, the evidentiary record only reflected a  
 23     single trial in which fifteen circulators were subpoenaed—as the court emphasized, that was  
 24     fewer than 0.6% of circulators for that petition. Here, the Complaint alleges that subpoenas  
 25     are being indiscriminately issued *en masse* repeatedly and that the result has been a  
 26     substantial burden on Plaintiffs’ rights. *Id.* ¶¶ 57–78. In *Stanwitz*, on the basis of the record  
 27     and arguments before it, the court reasoned that the Strikeout Law was reasonably related  
 28     to Arizona’s stated interests in “deterring fraud.” But such a generalized interest in fraud is

1 not sufficient to sustain a law that burdens Plaintiffs' fundamental rights under *Anderson-*  
 2 *Burdick* unless the state can show it somehow "fits" the purpose that it is purported to serve.  
 3 *Soltysik*, 910 F.3d at 445; *Pub. Integrity All.*, 836 F.3d at 1024–25. Yet, the Secretary has  
 4 failed entirely to explain why the Strikeout Law's severe penalty is a necessary supplement  
 5 to the general subpoena power it already exercises over all registered circulators.

6 For these reasons, the *Stanwitz* court's resolution of the state constitutional question  
 7 before it should have had no bearing on this Court's determination of the merits in this case,  
 8 let alone whether the allegations in Plaintiffs' Complaint, if taken as true, state a cognizable  
 9 claim under the First and Fourteenth Amendments to the U.S. Constitution. Indeed, even  
 10 the Secretary's counsel conceded that *Stanwitz* concerned the entirely different question of  
 11 whether the statute violated the Arizona Constitution's right to initiative under Article IV,  
 12 which is evaluated under a different legal standard. *See* Ex. 1, Oral Arg. Tr. 48:4-16 (counsel  
 13 for Secretary conceding Arizona state court decisions were not binding because they  
 14 focused on the state, rather than federal constitution, and "did not address federal First  
 15 Amendment issues nor did they address the counterpart to the First Amendment in the  
 16 Arizona constitution").

17 These differences alone make the reliance on *Stanwitz* manifest error, but even if the  
 18 cases were more similar, a raft of precedent establishes that federal courts may not avoid  
 19 taking on the task of independently making the "hard judgments" that the *Anderson-Burdick*  
 20 test demands, *see, e.g.*, *Crawford*, 553 U.S. at 190; *see also Burdick v. Takushi*, 937 F.2d  
 21 415, 418 (9th Cir. 1991), *aff'd*, 504 U.S. 428 (1992), in favor of relying on a decision by  
 22 another court—including the highest court of a state. In fact, in *Meyer* itself, the Supreme  
 23 Court struck down the very same statute that the Colorado Supreme Court had partially  
 24 upheld. *Meyer*, 486 U.S. at 423 (citing *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo.  
 25 1983)). Moreover, the U.S. Supreme Court has made clear that federal courts may not  
 26 abdicate their duty to engage in independent fact finding and apply the law, even when the  
 27 state courts have evaluated the *same law* under the *exact same federal* legal theory. Thus,  
 28 in *Cooper v. Harris*, 137 S. Ct. 1455, 1467 (2017), the Supreme Court rejected North

1 Carolina's assertion that a previous state supreme court decision that upheld a challenged  
 2 redistricting plan "should dictate (or at least influence) our disposition of this case," despite  
 3 the state court's consideration of the exact same federal challenge another set of plaintiffs  
 4 later raised in federal courts, and that a majority of the North Carolina state judges that  
 5 looked at the question (including on the North Carolina Supreme Court) concluded (unlike  
 6 the federal district court below) that the law did *not* violate the Constitution. *See id.* at 1467.

7 These decisions reflect the foundational principles of our government and legal  
 8 system: when Arizona joined the union in 1912, it voluntarily surrendered certain sovereign  
 9 prerogatives, including its right to enact laws that run afoul of the U.S. Constitution. *See*  
 10 U.S. Const., art. VI, cl. 2. (stating Constitution is the "supreme Law of the Land," the "Laws  
 11 of any State to the Contrary notwithstanding"); *see also League of Women Voters v.*  
 12 *Hargett*, No. 3:19-CV-00385, 2019 WL 4342972, at \*20 (M.D. Tenn. Sept. 12, 2019)  
 13 (finding when a state "in its sovereignty, chose to bind itself to the Constitution," "it is no  
 14 affront to that sovereignty to hold the state to its commitments"). And while a state need  
 15 not give its people the power to enact direct legislation, if it does, it must abide by the U.S.  
 16 Constitution when it regulates that power. *Idaho Coalition United for Bears v. Cenarrusa*,  
 17 342 F.3d 1073, 1077 (9th Cir. 2003) (citing *Bush v. Gore* 531 U.S. 98, 104–05 (2000)).  
 18 Determining whether a state has upheld its commitment of fidelity to the Constitution is,  
 19 and always has been, squarely within the province of the federal courts. *Marbury v.*  
 20 *Madison*, 5 U.S. (1 Cranch) 137 (1803).

21 Had the Court conducted the context-specific inquiry into the sufficiency of the  
 22 allegations that *Soltysik* requires, *see* 910 F.3d at 444, it would have concluded that  
 23 Plaintiffs state a cognizable *Anderson-Burdick* claim. The Complaint alleges that Plaintiffs  
 24 Mary Katz, Mendon Dornbrook, and Lonnie Arrington (as well as thousands of other voters  
 25 who supported petitions circulated by Arizonans for Fair Lending and NextGen) each had  
 26 their otherwise valid signatures on initiative petitions rejected under the Strikeout Law.  
 27 Compl. ¶ 115. None personally knew the circulator, knew in advance that their signature  
 28 would be rejected, or had any opportunity to cure the rejection. *Id.* Under the Strikeout Law,

1 the harm will reoccur in the upcoming cycle. Against these burdens, the State “can offer no  
2 countervailing interests,” and “cannot show that the Strikeout Law actually serves those  
3 interests.” *Id.* ¶ 117; *see also id.* ¶¶ 117-18 (detailing why State’s interests are not sufficient  
4 to outweigh burdens). Taken as true, these allegations are sufficient to state a claim. Under  
5 *Soltysik*, the ultimate weight of both the burden and the state’s interests are “fact-intensive”  
6 issues that cannot be resolved at the motion to dismiss stage and should proceed for further  
7 factual development.<sup>4</sup>

**D. The Court’s dismissal of Plaintiffs’ Equal Protection Claim (Count II), is contrary to binding precedent in *OSU Student Alliance*.**

10        Although the Court recognized that Plaintiffs have stated a cognizable claim that the  
11 Strikeout Law violates the First Amendment because it is a content-based restriction on  
12 speech, it simultaneously dismissed Plaintiffs' claim for differential treatment under the  
13 Equal Protection Clause—even though the Ninth Circuit has made clear that the two claims  
rise and fall together. Thus, the Court's characterization of Plaintiffs' Equal Protection

<sup>4</sup> To be clear, Plaintiffs maintain that the factual record developed in the PI proceedings also provides grounds for the Court to conclude that they are likely to succeed on the merits of their claims and to enjoin the Strikeout Law. And although the Order characterized Plaintiffs' desired injunction as "prevent[ing] state court judges from disqualifying signatures where they have found that paid and out-of-state initiative-petition circulators have failed to comply with subpoenas," Order at 18, that is not correct. Plaintiffs do *not* seek to restrain state court judges from exercising their sound judicial discretion in pre-election initiative challenges, including to strike signatures where they deem it warranted. The *opposite* is true; it is Plaintiffs' position that state court judges are more than capable of determining whether it is appropriate to invalidate a circulator's signatures in the face of non-appearance, based on the facts and context specific to the circumstances before them—particularly if there is objective indicia of possible fraud. Plaintiffs' objection is that the Strikeout Law removes discretion and mandates a selective (and severe) penalty—requiring that all such signatures be "deemed invalid," A.R.S § 19-118(E)—regardless of whether it is merited under the circumstances. That penalty penalizes not only initiative sponsors and circulators, but the voters who, through absolutely no fault of their own, have their support for a measure invalidated, even if there is no legitimate evidentiary basis for doing so. The proposed injunction would thus restore to the Arizona courts the discretion they have when evaluating challenges to signatures collected by all circulators in the nomination petition context, and even in-state volunteer circulators of initiative petitions. At no point has the Secretary argued, much less proffered any evidence, that those inherent judicial powers are in any way insufficient to serve its legitimate state interests.

1 claim as a “half-hearted attempt” to “transfer their First Amendment ‘content-based  
 2 restriction’ argument to the equal protection context,” Order at 12, is a quibble that properly  
 3 lies not with Plaintiffs but the Ninth Circuit.

4 In *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), the Ninth Circuit  
 5 reversed a district court’s dismissal of a speech-based Equal Protection claim, and in doing  
 6 so rejected the same reasoning used by the Court here. *Id.* at 1067. Because the *OSU*  
 7 plaintiffs did not allege that the defendant’s differential treatment “burdened any  
 8 fundamental right other than their speech rights … the differential treatment of plaintiffs  
 9 will draw strict scrutiny (as opposed to rational basis review) under the Equal Protection  
 10 Clause [assuming that] it impinged plaintiffs’ First Amendment rights.” *Id.* The Ninth  
 11 Circuit went on to reject the argument that “the equal protection claims’ dependence on the  
 12 First Amendment claims requires dismissal of the equal protection claims,” firmly  
 13 observing that “there is no authority for this proposition,” and the Supreme Court has never  
 14 “invoked the concept of duplicity or redundancy to find preclusion of a speech-based equal  
 15 protection claim.” *Id.* (collecting contrary cases). Instead, “[t]he equal protection claims rise  
 16 and fall with the First Amendment claims.” *Id.*; *see also Meyer*, 486 U.S. at 414.

17 Because the Court found that Plaintiffs had stated a claim that the Strikeout Law  
 18 violates the First Amendment because it is a content-based restriction on speech, *OSU*  
 19 *Student Alliance* requires it to also find that Plaintiffs have stated a claim that the same law  
 20 violates their right to equal protection of the laws.

#### 21 IV. CONCLUSION

22 Plaintiffs respectfully request that the Court reconsider its previous Order and deny  
 23 the Secretary’s Motion to Dismiss in its entirety, or, in the alternative, amend its previous  
 24 Order to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because the  
 25 Order’s dismissal of the above-referenced claims involves controlling questions of First and  
 26 Fourteenth Amendment law, represents substantial grounds for disagreement, and an  
 27 immediate appeal would materially advance the termination of this litigation.  
 28

1  
2 Dated: January 3, 2020

s/ Sarah R. Gonski

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## **CERTIFICATE OF SERVICE**

I hereby certify that on January 3, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

s/ Michelle DePass